IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	
v.	Case No. 1:96CV01285 (Special Master-Monitor Joseph S. Kieffer, III)
GALE A. NORTON, Secretary of the Interior, et al.,	
Defendants.	

INTERIOR DEFENDANTS' STATEMENT REGARDING DISCOVERY

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior"), state the following in response to Special Master-Monitor's letter dated September 29, 2002, regarding whether Interior Defendants have a right to discovery and the appropriate subject matter of discovery regarding Phase 1.5.

Introduction

By letter dated September 29, 2002, the Special Master-Monitor requested (at 2) Interior Defendants to brief the issues of whether they "have some right to discovery and that there is some meaningful discovery for them to take in relation to the trust reform issues to be addressed in the Phase 1.5 trial that will deal with the historical accounting and their fiduciary obligations to 'fix the system' and how they propose to do it." The letter further states that such a showing is needed in order to rule on Interior Defendants' outstanding motions to compel discovery.

Statement of Position

I. Interior Defendants' Right to Discovery

In considering whether Interior Defendants have a right to conduct discovery at this juncture of the case, the Special Master-Monitor focused on the following language in the Court's September 17, 2002 Memorandum Opinion ("Memorandum Opinion" or "Mem. Op.") (at 262):

> Accordingly, the Court will permit plaintiffs full discovery on matters that they otherwise would not have been able to explore prior to this decision. While the Court will thus expand the scope of discovery for the plaintiffs, the Special Master-Monitor shall ensure that such discovery does not unreasonably interfere with the defendants' ability to develop their plans for submission to the Court.

See Letter from Joseph S. Kieffer, III, to Sandra Spooner (9/29/2002) at 1-2. The Special Master-Monitor asked for comment on whether that statement, by not mentioning Defendants' discovery, meant to preclude discovery by Defendants, or whether that statement simply means that "defendants still have some limited right to discovery that they shared with defendants (sic) prior to the Court' s September 17, 2002 Memorandum and Order."[1] Id.

Other language in the Court's September 17, 2002 Memorandum Opinion, and prior orders in this case, reveal that the above-quoted language from the Memorandum Opinion merely lifted a prior limit on Plaintiffs' discovery, and is irrelevant to Defendants' discovery. Language in the Memorandum Opinion (at 261-62) immediately preceding the above-quoted passage reveals that the Court was merely lifting a prior restriction on Plaintiffs' discovery imposed by the Court's December 21, 1999 opinion and order:

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[1] We assume that the Special Master-Monitor's letter contains a typographical error, and that the phrase "that they shared with defendants" should read "that they shared with plaintiffs."

> At the time the Court issued its Phase I trial decision [on December 21, 1999], the Court found that it was sufficient for the defendants to file quarterly status reports and for plaintiffs to then 'petition the court to order defendants to provide further information as needed if such information cannot be obtained through informal requests directly to defendants.' Cobell V [Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999)] at 59.

Thus, the Court's December 21, 1999 opinion and order precluded Plaintiffs from conducting discovery into the matters covered by the quarterly reports submitted by Defendants, unless Plaintiffs first petitioned for and obtained leave of court. The September 17, 2002 Memorandum Opinion merely lifted that restriction. But the Court's December 21, 1999 opinion and order did not impose restrictions on the Defendants' discovery. Thus, the September 17, 2002 Memorandum Opinion's silence regarding Defendants' discovery cannot reasonably be interpreted to mean that Defendants' discovery is restricted.

Another order in this case demonstrates that Defendants already had the right to conduct discovery prior to September 17, 2002 and, therefore, did not require an express allowance of discovery in the September 17, 2002 Memorandum Opinion. The opinion and order entered by Special Master Alan Balaran on September 28, 2001 (filed October 1, 2001) (the "Special Master Discovery Order"), a copy of which is attached hereto, (at 11-12) states:

> To help chart a manageable course for the parties to follow, the Special Master intends this order to provide a roadmap for future discovery in this case which will hopefully facilitate this litigation to a just and achievable conclusion. At this time, the following are permissible areas for Phase II discovery:
>
> - Discovery pertaining to the "nature or amount of trust property," i.e., specific beneficiaries or lands;
>
> - Discovery pertaining to the agencies'

decision-making process regarding its methods of accounting;

- Discovery pertaining to statutes of limitations and the scope of the plaintiff class; and

- Discovery pertaining to the agencies' compliance with extant court orders, particularly to the question of continued delays in implementation of the District Court's December 1999 Order.

The Special Master Discovery Order (at 12 n.6) also stated that the above list "is not intended to be exhaustive as other areas of discovery may be addressed upon petition by the parties." Although the Special Master Discovery Order referred to "Phase II discovery," Defendants' discovery on the applicable topics is equally applicable to Phase 1.5, as we show in part II, below.

The Special Master Discovery Order's list of permitted discovery topics pertains to discovery allowed to Defendants as well as to Plaintiffs. For example, the third topic ("statutes of limitations and the scope of the plaintiff class") pertains to defenses and arguments of Defendants, because, for example, Plaintiffs would have no reason to conduct discovery as to the "scope" of their own class. Thus, the Special Master Discovery Order obviously contemplated and permitted discovery by Defendants.

Finally, the Federal Rules of Civil Procedure ("Rules" or "Rule") allow all parties to conduct discovery. See Rule 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party"). The right to discovery does not depend upon the Court expressly allowing it; rather, the right to discovery exists unless the Court

explicitly limits or precludes it. Because the goal of discovery is to further the search for truth, it should be allowed to proceed. See Odone v. Croda Int'l PLC, 950 F. Supp. 10, 12 (D.D.C. 1997) ("discovery should be liberal and broad in furtherance of the search for truth"); PHE, Inc. v. Department of Justice, 139 F.R.D. 249, 256 (D.D.C. 1991) (same). The Court's mere silence on the subject of Defendants' discovery cannot possibly be read to abrogate Defendants' discovery rights.

In summary, the Court's December 21, 1999 opinion and order imposed a restriction upon Plaintiffs' (but not Defendants') discovery. The September 17, 2002 Memorandum Opinion merely lifted that restriction, but had no effect on Defendants' discovery. Pursuant to the Special Master Discovery Order, Defendants already had a right to discovery. This is consistent with the Rules, which automatically allow all parties to conduct discovery. Absent a limitation imposed by the Court (and no such limitation appears in any of the Court's orders), Defendants' right to discovery remains intact. Denial of Defendants' right to full and fair discovery before trial would be a fundamental denial of due process, which cannot stand.

II. Appropriate Areas of Discovery

While Interior Defendants do not concede that their discovery should be limited only to the issues pertaining to the subject matter of Phase 1.5, they certainly should, at the very least, be allowed discovery on the many topics relevant to Phase 1.5. First, the topics that the Special Master Discovery Order (quoted above) already permitted should remain open to discovery by Defendants. For example, topic number 3 ("discovery pertaining to statutes of limitations and the scope of the plaintiff class") is highly relevant to Phase 1.5. Phase 1.5 involves, among other things, the Court's "approving an approach to conducting a historical accounting of the IIM trust

accounts." Mem. Op. at 242.

One of the key issues involved in an historical accounting is whether the time period covered will be limited by the statute of limitations. The Court's December 21, 1999 opinion expressly held that this issue remains to be decided. 91 F. Supp. 2d at 32 n.22. The plan for "conducting a historical accounting" would be altered dramatically if the time period for the accounting were limited by the statute of limitations. Therefore, resolution of the statute of limitations issue is vital to Phase 1.5, and Defendants should be allowed discovery on this subject. Indeed, the Court acknowledged this in its November 5, 1998 opinion, Cobell v. Babbitt, 30 F. Supp. 2d 24, 45 (D.D.C. 1998), discussing some factual points pertinent to the statute of limitations issue, and specifically stating "[t]he defendants remain free to raise their statute of limitations defense at the summary judgment stage, once the parties have completed their discovery of facts that go to the plaintiffs' knowledge and have had the opportunity to adequately brief the issues presented." (emphasis added).

Similarly, issues relating to the "scope of the plaintiff class" referenced in the Special Master Discovery Order are also relevant to a Phase 1.5 trial. The case has been certified as a class action under Rule 23(b)(1)(a) and (b)(2), so one key issue for trial will be whether the plan for an historical accounting and for fixing the system adequately addresses the interests of all class members. This issue necessarily requires discovery to determine and verify the scope of the class and to evaluate how individual class members would be treated by a particular approach or method. Indeed, if class members are found to have differing circumstances such that some class members' interests might be at odds with other class members in following a particular approach, then review of the plans presented would have to take into account the competing interests of

separate subclasses.[2] See generally Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 626 (1997) (improper to allow "named parties with diverse medical conditions . . . to act on behalf of a single giant class rather than on behalf of discrete subclasses"). These considerations can only be fairly evaluated through full discovery. Lipton v. MCI Worldcom, Inc., 135 F. Supp. 2d 182, 192 (D.D.C. 2001) ("propriety of a class action cannot be determined in some cases without discovery, as for example where discovery is necessary to determine . . . a set of subclasses").

The following are additional topics that, although not part of the Special Master Discovery Order, are profoundly relevant to Phase 1.5, and, therefore, should be permitted topics of discovery by Defendants:

- Disclosure of, and facts surrounding, any plan for an accounting or for "additional remedies with respect to the fixing the system portion of the case" (Memorandum Opinion at 242) that Plaintiffs will present in connection with Phase 1.5.
- Facts or contentions of Plaintiffs regarding the suitability, appropriateness and any flaws they perceive in the methods and results of the Ernst & Young analysis of the five named Plaintiffs' accounts, or any other methodology that Interior might employ.
- Documents and information that Plaintiffs have or of which they have knowledge that would be useful or pertinent to preparation of a plan for an historical

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[2]Indeed, the Court retains the power to modify, amend or even decertify the class notwithstanding its earlier grant of class certification. See Rule 23(c)(1) (certification order "may be conditional, and may be altered or amended before the decision on the merits"); see generally Walsh v. Ford Motor Co., 106 F.R.D. 378, 387 (D.D.C. 1985) ("any certification determination is conditional and may be altered, expanded, subdivided, or vacated as the case begins to progress toward an actual merits determination"), vacated on other grounds, 807 F.2d 1000 (D.C. Cir. 1986).

accounting or for additional remedies for fixing the system, and identification of witnesses with such knowledge..

- Discovery regarding expert witness testimony that Plaintiffs might present in connection with Phase 1.5. If Plaintiffs expect to prove their proposed plan, or to attack Interior Defendants' plan, by using expert testimony, Interior Defendants are entitled to the full panoply of expert witness discovery mandated by Rule 26.
- Documents and information pertaining to Plaintiffs' allegations concerning the sums of money that they contend should be included within the historical accounting.

Conclusion

Neither the Court's September 17, 2002 Memorandum Opinion, nor any other order of the Court, precludes discovery by Defendants with regard to Phase 1.5. On the contrary, other orders in this case, as well as the Federal Rules of Civil Procedure, clearly contemplate discovery by

(continued on next page)

Defendants. The topics listed above are plainly relevant to issues in Phase 1.5 in this case. For the reasons stated, Defendants should be permitted discovery into these matters.

Respectfully submitted,

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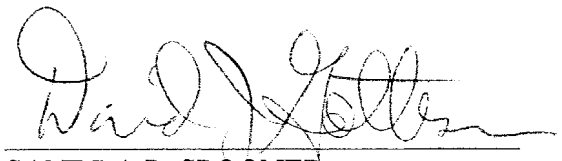

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Dated: October 1, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on October 1, 2002 I served the foregoing *Interior Defendants' Statement Regarding Discovery* by facsimile, in accordance with their written request of October 31, 2001 upon:

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and by U.S. Mail upon:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

V.

GALE A. NORTON, et al.,

Defendants.

Civil Action No. 96-1285 (RCL)

Let This be filed.
Royce C. Lamberth
U.S.D.J. 10/1/01

OPINION AND ORDER

The questions currently before the Special Master are: (1) what impact, if any, did the District of Columbia Court of Appeals opinion in Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) have on the scope of discovery in this litigation and (2) whether said discovery is limited to a review of the administrative record. See March 12, 2001 Letter from Special Master to Phillip Brooks and Dennis Gingold at 1. The parties, on April 6 and April 25, 2001, filed simultaneous briefs and responses setting out their respective positions on these questions.

Before deciding these issues, a brief recapitulation of the history of this case and its current procedural posture is in order.

BACKGROUND

On June 10, 1996, plaintiffs brought a class action on behalf of all present and former Individual Indian Money ("IIM") account beneficiaries against the U.S. Departments of Interior and Treasury in their capacities as trustee-delegates for the federal government with respect to Indian lands, in general, and IIM accounts, in particular. On May 5, 1998, the District Court bifurcated the case into "Phase I" and "Phase II" – specifying that Phase I would focus primarily on "fixing the system" or "reforming the management and accounting of the IIM trusts to meet

the government's fiduciary responsibilities," Cobell v. Norton, 240 F.3d at 1093, and Phase II would address "the historical accounting of the accounts." Id.

Adjudication of Phase I took place between June 10, 1999 and July 23, 2001 – at the conclusion of which the Court: (1) held both agencies in breach of their fiduciary duties, see Cobell v. Babbitt, 91 F.Supp.2d 1, 48-50 (D.D.C. 1999); (2) "remand[ed] the case for further agency consideration in harmony with the court's holding," id. at 54-55 n. 36; and (3) ordered defendants to "promptly come into compliance" by, among other things, establishing written policies and procedures to "rectify th[ose] breaches." Id. at 58. To ensure compliance, the District Court retained continuing jurisdiction over the case for five years and ordered the defendants to submit quarterly reports detailing their progress toward rectifying the identified breaches of trust. Id. at 59.

On February 23, 2001, the D.C. Circuit unanimously affirmed the District Court's opinion and agreed that "[t]he Interior Department has failed to discharge the fiduciary duties it owes to IIM beneficiaries for decades" and that "[d]espite passage of the 1994 Act, the Department is still unable to execute the most fundamental of trust duties – an accurate accounting." At the same time, the Circuit cautioned the District Court to "be mindful of the limits of its jurisdiction." Cobell v. Norton, 240 F.3d at 1110, and to afford defendants "sufficient discretion in determining the precise route they take, so long as this threshold is met." Id., at 1106.

On March 12, 2001, the Special Master directed the parties to brief the impact of this decision on both existing and future discovery obligations. The parties' responses and the Special Master's analysis are set out below.

ANALYSIS

Before ruling on the questions peculiar to Phase II litigation, it is necessary to touch upon those outstanding requests which continue to bear directly on Phase I and those which have implications for both Phases I and II.

In keeping with its decision to maintain judicial oversight over defendants' remediation efforts, the District Court, on December 12, 1999, imposed a mechanism for defendants to provide "any additional information requested by the court or [to] supplement defendants' submissions." Cobell, 91 F.Supp.2d at 56. The District Court further contemplated that any contention which arose from this informal flow of information triggered plaintiffs' right to "petition the court to order defendants to provide further information as needed." Id.

On March 8, 2001, the Special Master, in response to Defendants' Motion for Protective Order To Postpone by Ten Days One Deposition and to Limit the Scope of All Depositions Currently Scheduled to Phase II Issues, clarified the Court's holding and ruled that plaintiffs could not utilize the formal discovery process of Phase II to seek information relating to the previously adjudicated "fixing the system" issues but were free to inquire into matters which may be relevant to both Phase I and Phase II including,

> the integrity of accounting information stored in existing systems; information regarding what records are available – both paper and electronic; information regarding where and how that data is stored – e.g., TAAMS, TFAS, IRMS, LRIS, etc.; information regarding the policies and procedures that are currently being utilized to manage the information necessary to perform an accounting; information regarding which assets belong to which beneficiaries that implicates data integrity and probate issues; information relating to the background and abilities of those Interior employees charged with input, handling and storage of data necessary to perform an accounting.

March 8, 2001 Report and Recommendation of the Special Master Concerning Defendants' Motion for Protective Order to Postpone by Ten Days One Deposition and to Limit the Scope of All Depositions Currently Scheduled to Phase II Issues, at 4.

The D.C. Circuit's opinion effects no change on these rulings.[1] Indeed, the Circuit gave its explicit blessing to the District Court's retention of jurisdiction, see Cobell, 240 F.3d at 1109, ("[w]hile a court's retaining of jurisdiction of five years may be unusual, federal courts regularly retain jurisdiction until a federal agency has complied with its legal obligations") and to its imposing an obligation to regularly report remediation efforts (federal courts also "have the authority to compel regular progress reports in the meantime.") Id. (citations omitted). As to the scope of the informal discovery defendants are to provide during the retention period, this issue was never contested on appeal and, therefore, stands unopposed. See Williamsburg Wax Museum, Inc. v. Historic Figures, Inc., 810 F.2d 243, 250 (D.C.Cir. 1987) ("Under law of the case doctrine, a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time").

As to those discovery requests unique to Phase II proceedings, the initial question to be addressed is whether this case is governed by traditional "trust accounting" principles or by the strictures of the Administrative Procedure Act ("APA") (5 U.S.C. §§ 701 et seq.).

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[1] Similarly undisturbed is defendant's obligation to produce all documents responsive to paragraph 19 of the court's November 27, 1996 First Order for Production of Information which requires defendants to produce "[a]ll documents, records, and tangible things which embody, refer to, or relate to IIM accounts of the five-named Plaintiffs or their predecessors in interest."

Plaintiffs urge that Phase II be strictly construed in accordance with settled trust principles that require a fiduciary to furnish complete information to its beneficiaries regarding the trust being administered – including all information needed to protect those beneficiaries' rights. See Plaintiffs' Memorandum Regarding Scope of Discovery ("Plaintiffs' Brief") at 4 (citing Restatement (Second) of Trusts, §173 and Comment c)[2]; Plaintiffs' Response to Defendants' Memorandum on the Scope of Discovery ("Plaintiffs' Response") at 1. So construed, plaintiffs' request for access to trust information must be afforded maximum breath insofar as defendants are "under a duty to the beneficiary to give him . . . complete and accurate information as to the nature and amount of the trust property," Restatement (Second) of Trusts § 173, and "the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." Restatement (Second) of Trusts, § 173, Comment c.[3]

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[2] Restatement (Second) of Trusts § 173 (DUTY TO FURNISH INFORMATION) provides:

> The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

[3] This practically unfettered right to such information has been held, for example, to trump common-law doctrines which would normally shield information from disclosure – such as the attorney-client privilege. See e.g., Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F.Supp. 906, 909 (D.D.C. 1982) ("fiduciary exception" between trustee and beneficiary not an "exception" to privilege but rather circumstance where no privilege exists); See also Everett v. US Air Group, Inc., 165 F.R.D. 1, 5 (D.D.C. 1995)(ERISA plan beneficiary is "ultimate client"); Wildbur v. Arco Chemical Co., 974 F.2d 631, 645 (5th Cir. 1992) (attorneys' clients are the plan beneficiaries for whom the fiduciary acts); In re Long Island Lighting Co., 129 F.3d 268, 272 (2nd Cir. 1997) (ERISA fiduciary may not use privilege

Defendants, in contrast, argue that this case is both circumscribed and defined by the Administrative Procedure Act and thus falls "squarely in the realm of traditional court review of the administrative actions of the Executive Branch – a realm where discovery is, at best, highly unusual and always severely limited." Defendants' Response to Plaintiffs' Brief on the Effect of the Recent Decision of the Court of Appeals on Further Discovery in This Case ("Defendants' Response") at 2.

From this standpoint, judicial review of Interior's conduct would be constrained by substantial deference to the agency and its decision-making process and "discovery" would be limited to review of the agency's "administrative record." See, e.g., AMFAC Resorts, LLC, v. U.S. Dept. of the Interior, 143 F.Supp.2d 7, 10 (D.D.C. 2001)("in cases brought under the APA . . . judicial review is normally confined to the administrative record"); Community for Creative Non-Violence [CCNV] et al., v. Lujan, 908 F.2d 992, 997 (D.C. Cir. 1990)(discovery of the agency decision-making process is available in only two circumstances: where "there has been a strong showing of bad faith or improper behavior," or "when such examination provides the only possibility for effective judicial review and when there have been no contemporaneous administrative findings")(citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 825 (1971)). Confining the scope of review of agency action under the APA is grounded in the principle that, as courts and the executive branch are constitutional equals in our system of separation of powers, courts are ill-suited to impose their prerogatives on executive branch

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to narrow fiduciary obligation of disclosure to plan beneficiaries); Martin v. Valley National Bank of Arizona, 140 F.R.D. 291, 325 (S.D.N.Y. 1991)(same). See September 11, 2001 Opinion and Order of the Special Master, at 6-11.

decisions. See San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1325 (D.C.Cir. 1986)(en banc)("judicial reliance on an agency's stated rationale and findings is central to a harmonious relationship between agency and court, one which recognizes that the agency and not the court is the principal decision-maker"). Hence, courts' review of agency actions is normally limited, as a legal matter, to determining whether the decision was "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence . . .; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo" by the reviewing court." 5 U.S.C. §706.[4]

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[4] Defendants' briefs are inconsistent regarding the necessity for compiling an administrative record. In their opening brief they represent that, because the decision process concerning method of accounting constitutes an "informal agency action" rather than a formal adjudication or rulemaking which traditionally give rise to a formal administrative record, there will be no administrative record compiled. See Defendants' Brief on the Effect of the Recent Decision of the Court of Appeals on Further Discovery in This Case ("Defendants' Brief") at 12, no. 9. In Defendants' Response, they argue, "[f]ollowing a final agency action that is ripe for review, if they choose to challenge the action, Plaintiffs will be provided the administrative record compiled by the agency." Defendants' Response at 8. Defendants' second position is more in keeping with the clear law regarding informal agency actions. While such actions do not give rise to a "formal" record, some record of the decision process is required. Florida Power & Light Co. v. U.S. NRC, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court"). The administrative record of informal agency action should include all documents that were considered by the agency in reaching its determination, broadly defined. AMFAC, supra, 143 F.Supp.2d at 12-13 (citations omitted). Indeed, if no such record is proffered, full discovery would be justified to create an evidentiary record one sufficient to enable meaningful judicial review. Id. at 11, (citing Camp v. Pitts, 411 U.S. 138, 142-43 (1973)).

In navigating between these seemingly irreconcilable positions, it is the opinion of the Special Master that each party, while correct in the strictest of legal contexts, presents a perspective whose sole application to this case is both untenable and extreme.

It is beyond dispute that the core of Phase II concerns a trust relationship whose dominant focus, at this point, is the historical accounting of the accounts. Cobell v. Norton, 91 F.Supp.2d at 31. As such, both legal precedent, in general, and this Circuit's opinion, in particular, state with textbook clarity that, in actions between Indian trust beneficiaries and the government as administrator of that trust, deference accorded agencies pursuant to Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984) is supplanted by "the rule of liberally construing statutes [and other legal ambiguities] to the benefit of the Indians." Cobell, 240 F.3d at 1101 (quoting Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C.Cir. 1991). On that score, the Cobell panel repeatedly emphasized the applicability of trust law, the stringent fiduciary duties owed by the defendants to the plaintiffs, and the limits to traditional application of "APA deference." See e.g., Cobell v. Norton, 240 F.3d at 1101 ("we give the agency's interpretation 'careful consideration' but 'we do not defer to it'")(citations omitted); id. at 1100 ("[t]he trust nature of the federal government's IIM responsibilities was recognized long before passage of the 1994 [Indian Trust Fund Management Reform] Act [and] the most exacting fiduciary standards of the common law [must be applied] in assessing the government's discharge of its duties")(citing Seminole Nation v. United States, 316 U.S. 286, 297 (1942)); id. at 1101 ("[t]he general 'contours' of the government's obligations may be defined by statute but the interstices must be filled in through reference to general trust law"); id. at 1099 ("the Secretary 'cannot escape his role as trustee by

donning the mantle of administrator' to claim that courts must defer to his expertise and delegated authority")(citations omitted); id. at 1104 (same).

That being said, courts must be mindful of the limitations imposed by the Administrative Procedure Act to judicial oversight of the conduct of federal agencies. The Cobell panel, for example, took pains to delineate the contours of and exceptions to the overarching administrative rule that "[c]ourts owe substantial deference to agency prerogatives in fulfilling their legal obligations, especially where Congress intervenes to address longstanding problems, as it did with the 1994 Act." Cobell, 240 F.3d at 1096. Such deference took explicit form when the Circuit first noted that "[t]he district court explicitly left open the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate," and then emphasized that, "[s]uch decisions are properly left in the hands of administrative agencies." Cobell, 240 F.3d at 1104.

Beyond these seemingly polarized perspectives, it is clear neither the principles of trust law nor the principles of administrative law are unyielding. This Circuit has recognized multiple exceptions to the standard rule of strict "record review" in APA cases. See Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989)(recognizing eight distinct exceptions to the rule limiting judicial review to the administrative record, and holding that where the procedural validity of defendant's actions are "in serious question," extra-record information may be appropriate)(citing Stark & Wald, "Setting no Records: The Failed Attempts to Limit the Record in Review of Administrative Action," 36 Admin. L. Rev. 333, 345 (1984)); AMFAC Resorts v. DOI, 143 F.Supp.2d 7, 11 and n. 5 (D.D.C. 2001) (Lamberth, J.) (noting four "well-established" exceptions to record review in

this Circuit;[5] Edison Electric Institute v. OSHA, 849 F.2d 611, 618 (D.C. Cir. 1988)(permitting agency to supplement record with post hoc information, when responding to new argument raised by plaintiff); CCNV, supra, 908 F.2d at 997-98 (recognizing two exceptions to record review for bad faith and inadequate record, but upholding denial of discovery)(citing Overton Park); Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C.Cir.1998)(same); Eugene Burger Management Corporation v. United States Dept. of Housing and Urban Development, 192 F.R.D. 1, 12 (D.D.C. 1999)(discovery in APA case only permitted in two circumstances noted above)(citing Saratoga Development Corp. v. United States, 21 F.3d 445, 458 (D.C.Cir. 1994)).

While exceptions to the trust rule of open records are less plentiful, the rule requiring unfettered disclosure to beneficiaries is not absolute. For example, the Restatement (Second) of Trusts, while asserting the right to information about the "nature and amount of the trust property," limits beneficiaries' right to the broader category of information, i.e., that needed to enable them "to enforce [their] rights under the trust or to prevent or redress a breach of trust" and to information which is "reasonably necessary" for those purposes. Restatement (Second) of Trusts § 173, Comment c. See also Clifford v. U.S., 136 F.3d 144, 152 (D.C. Cir. 1998)(rejecting beneficiaries' request to see trustee's sealed records, where beneficiaries are also defendants in

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[5] The Court, on this point, held that additional evidence may be discovered and admitted when: (1) there is a lack of administrative record or failure to explain administrative action, frustrating judicial review; (2) discovery is necessary to establish whether the agency considered all the relevant factors; (3) the agency may have excluded - either negligently or deliberately - documents adverse to its decision; or (4) there is strong evidence of bad faith or improper behavior by the defendant agency. See AMFAC Resorts v. DOI, 143 F.Supp.2d at 11 (citations omitted).

lawsuit by trustee); White Mountain Apache Tribe of Arizona v. U.S., 9 Cl.Ct. 1 (1985)(granting in part and denying in part beneficiaries' request for supplemental accounting and disbursement records); U.S. v. Mett, 178 F.3d 1058, 1063 (9th Cir.1999)(reversing lower court and holding that where attorneys are consulted by trustees with respect to their personal liability, attorney-client privilege precludes release of information); Faircloth v. Lundy Packing Co., 91 F.3d 648, 656-57 (4th Cir. 1996)(under ERISA, beneficiaries not entitled to every document they seek even if they "would enable them to prevent or redress a breach of trust"); Martin v. Valley National Bank of Arizona, 140 F.R.D. 291, 325-26 (S.D.N.Y. 1991)("fiduciary exception" to privilege does not attach where trustee and beneficiary have potentially conflicting interests).

In short, neither body of law – trust law or APA law – constitutes an unyielding position and neither should unequivocally dictate the scope of discovery in this case. It is the position of the Special Master, therefore, that both, should guide future discovery in accordance with the ruling articulated below. Insofar as the core of Phase II concerns a trust accounting, basic principles of trust law should govern the release of basic trust records and, insofar as the plaintiffs' challenges to the defendant agencies' processes of implementing an accounting implicate basic principles concerning judicial review of agency decisions, APA law should govern the discovery of the agencies' decision processes.

DISCOVERY RULING

To help chart a manageable course for the parties to follow, the Special Master intends this order to provide a roadmap for future discovery in this case which will hopefully facilitate this litigation to a just and achievable conclusion. At this time, the following are permissible areas for Phase II discovery:

- Discovery pertaining to the "nature or amount of trust property," i.e., specific beneficiaries or lands;

- Discovery pertaining to the agencies' decision-making process regarding its methods of accounting;

- Discovery pertaining to statutes of limitations and the scope of the plaintiff class; and

- Discovery pertaining to the agencies' compliance with extant court orders, particularly to the question of continued delays in implementation of the District Court's December 1999 Order.[6]

By way of clarification:

(1) Trust records pertaining to "the nature and amount of trust property."

In accordance with well-grounded principles obligating a trustee to provide beneficiaries with "complete and accurate information as to the nature and amount of the trust property in trust," Restatement (Second) of Trusts, § 173, and Comment c, plaintiffs may seek the release of records concerning the trust interests of particular beneficiaries and inquire into the existence of transactional documents related to those beneficiaries. However, the Special Master expects the plaintiffs to invoke this right judiciously. A request for all records pertaining to all beneficiaries, or the like, will be frowned upon and may well be denied on grounds of undue burden and because such a request will cause even greater delay in the ultimate resolution of this case.[7] As plaintiffs have repeatedly pointed out, and both the District and Appellate Courts have recognized, the consequences of agency delay are great. See Cobell v. Norton, 240 F.3d at 1109; Cobell v.

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[6] This list is not intended to be exhaustive as other areas of discovery may be addressed upon petition by the parties.

[7] Documents related to pooled interest, however, may well be within the permissible scope of discovery.

Babbitt, 91 F.Supp.2d at 47. To the extent that a request for massive numbers of beneficiary records interferes with the defendants' process of accomplishing the accounting, the Special Master will weigh the costs in terms of delay against the benefits to plaintiffs, in conformity with local precedent. See, e.g., Linder v. Department of Defense, 133 F.3d 17, 24 (D.C.Cir. 1998) ("To the extent such information satisfies Rule 26's broad definition of relevance, the district court may decline to order the agencies to search for that information only if the agencies satisfy their heavy burden of proving oppressiveness or establish some other recognized ground for modifying or quashing subpoenas for relevant information").[8]

(2) The Agencies' Decision Process Regarding the Method of Accounting.

Acknowledging that "supervision of the Department's conduct in preparing an accounting may well be beyond the district court's jurisdiction," Cobell, 240 F.3d at 1110, the D.C. Circuit observed that, "the choice of how the accounting would be conducted, and whether certain accounting methods, such as statistical sampling or something else, would be appropriate . . . . are properly left in the hands of administrative agencies." Id. at 1104. In keeping with this acknowledgment and the Circuit's general admonition to the District Court to remain "mindful" of its jurisdiction, it appears that if there is any arena within which defendant agencies might be expected to exercise their discretion and expertise, it should be in the choice and implementation

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[8] See also Burka v. U.S. Dept. of Health and Human Services, 87 F.3d 508, 517 (D.C.Cir. 1996) ("The decision to limit or deny discovery by means of a Rule 26 protective order rests on a balancing of various factors: the requester's need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material; and the harm which disclosure would cause to the party seeking to protect the information").

of an accounting method. Permitting the agencies to formulate their own methodology without subjecting every nuance of their decision-making process to inspection and challenge is ultimately in the interest of the plaintiff class, insofar as it should expedite the ultimate resolution in this case. The natural corollary of granting agencies some deference is, however, the required expectation that an administrative record will be created in accordance with traditional APA standards.

Partially shielding defendants from discovery relating to their decision-making process does not, however, immunize that process from review. If, after a record is proffered (or if no record is proffered after a reasonable amount of time as determined by the Court), plaintiffs can make a showing that it is insufficient, either on its face, or because it excludes relevant documents, discovery relating to those infirmities may be permitted. See AMFAC, 143 F.Supp.2d at 11 (citations omitted). Plaintiffs may, of course, challenge the method chosen by defendants by cross-examining defendants' witnesses and/or by offering their own statistical expert. If, after the record is proffered, plaintiffs can make a prima facie showing that the methods or techniques defendants have chosen are unnecessarily flawed, the Special Master will entertain a request for discovery regarding defendants' decision process. Such discovery may be consistent with the exception to record review under the APA in cases of "bad faith and improper action." Id. at 12.

(3) Statutes of Limitations and Scope of Plaintiff Class.

These issues have already been identified by the District Court and conceded by both parties as legitimate areas of inquiry in preparation for the Phase II trial, see Cobell v. Babbitt, 91

F.Supp.2d at 32, n.22; Defendants' Opposition at 3; Plaintiffs' Brief at 6, no further explication is needed.

(4) Compliance with Extant Court Orders and Delay.

Plaintiffs argue that discovery may be necessary to monitor defendants' compliance with those orders already issued and also to assign responsibility for past misconduct during the course of this litigation. They also contend that discovery concerning continuing delays by defendants must be permitted. Plaintiffs' Brief at 5; Plaintiffs' Opposition at 4-7 and notes 2 and 3. Defendants "agree that discovery is appropriate on matters relating to compliance with Court Orders," Defendants' Opposition at 3, yet oppose discovery aimed at investigating unreasonable delay. Id. at 11.

Defendant's opposition to plaintiff's inquiry into unreasonable delay is not sustainable as this issue is squarely subsumed within an extant order which defendant concedes is proper – specifically, the District Court's December 1999 Order requiring defendants to "promptly come into compliance" (emphasis added) with their trust obligations by adopting "written policies and procedures." Cobell, 91 F.Supp.2d at 40. Beyond this, the Court of Appeals has expressly admonished the District Court to "ensure that its instructions are followed" and stated that detection of actions by the Defendants which would "delay rather than accelerate" an accounting fits "within the court's jurisdiction to monitor the Department's remedying of the delay." Cobell, 240 F.3d at 1110.

There can thus be no question that both discovery aimed at monitoring compliance with all outstanding court orders as well as discovery relevant to a determination of "undue delay" are properly within plaintiffs' reach.

DATE: 9/28/01

Alan L. Balaran
SPECIAL MASTER